

**IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

SKAGGS BUILDING SOLUTIONS, LLC

PLAINTIFF

VS.

CAUSE NO. A2401-2019-29

**ENCOMPASS DEVELOP, DESIGN &
CONSTRUCT, LLC and GULF COAST
STUDENT HOUSING, LLC**

DEFENDANTS

**ENCOMPASS DEVELOP, DESIGN & CONSTRUCT, LLC'S
MOTION TO DISMISS, OR ALTERNATIVELY, TO COMPEL ARBITRATION AND
STAY PROCEEDINGS AGAINST SKAGGS BUILDING SOLUTIONS, LLC**

I. Facts

This case arises out of a subcontract between Defendant Encompass Develop, Design & Construct, LLC and Plaintiff Skaggs Building Solutions, LLC. On July 9, 2018, Plaintiff signed its subcontract with Encompass for the performance of work on a student housing project at 522 E. Railroad St. in Long Beach, Mississippi, 39560 (the "Project"). *See Exhibit "A."* In the event of a dispute, the subcontract provides for three distinct steps to resolution: (1) "good faith direct discussions between the parties' representatives," (2) "[i]f the direct discussion do not result in resolution of the matter within thirty (30) days from the date of first discussion, the parties shall submit the matter to mediation and endeavor to timely resolve the matter by mediation," and (3) "[i]f the matter is unresolved after submission of the matter to mediation, the parties shall submit the matter to binding arbitration." *Id.* at 11. Despite its contractual obligation to first mediate disputes with Encompass and then, if necessary, bring its claims in arbitration, Plaintiff sued Encompass and Gulf Coast Student Housing, LLC in this Court on February 1, 2019. [Dkt. 1].

II. Argument

A. The Federal Arbitration Act Requires that This Dispute be Arbitrated.

Mississippi law holds that courts must conduct a two-pronged inquiry in deciding whether to enforce an arbitration agreement under the Federal Arbitration Act. *Wells Fargo Advisors, LLC v. Pritchard*, 122 So. 3d 791, 794 (Miss. Ct. App. 2013) (citing *E. Ford Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002)). This inquiry involves asking, “(1) is there a valid agreement to arbitrate the claims, and (2) does the dispute in question fall within the scope of that arbitration agreement.” *Id.* Plaintiff signed a valid agreement to arbitrate.

All of Plaintiff’s claims arise from work performed on the Project through its subcontract with Encompass, and as a result, fall within the scope of the arbitration clause. The Mississippi Supreme Court has held that any doubts as to the availability of arbitration must be resolved in favor of arbitration. *Wells Fargo*, 122 So. 3d at 794-95 (citing *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 107 (Miss. 1998)). There are no legal constraints outside of the subcontract that preclude arbitration of this dispute.

B. Mississippi’s Construction Arbitration Act Requires that This Dispute be Arbitrated.

Miss. Code Ann. § 11-15-101(1), discussing the agreements to which arbitration provisions apply, provides that § 11-15-101 through § 11-15-143,

[S]hall apply to any agreement for the planning, design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility or any part thereof, and to any purchase by, or supply to, any contractor or subcontractor qualified to do business in this state of any materials to be used in the planning, design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility or any part thereof.

Section 11-15-103, in relevant part, states:

Two (2) or more parties referred to in Section 11-15-101 may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of

any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable and irrevocable without regard to the justiciable character of the controversy.

Section 11-15-105(1), in relevant part, states:

Any party to an agreement or provision for arbitration subject to Sections 11-15-101 through 11-15-143 claiming the neglect or refusal of another party thereto to comply therewith may make application to the court as described in Sections 11-15-133 and 11-15-135 for an order directing the parties to proceed with arbitration in accordance with the terms of such agreement or provision.

See Miss. Code Ann. §§ 11-15-101(1), 103, 105(1). Thus, in addition to the Federal Arbitration Act, Mississippi's Construction Arbitration Act requires that Plaintiff's dispute be arbitrated.

C. Plaintiff's Case Should be Dismissed.

The Mississippi Supreme Court has held that "the Mississippi Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, and we have looked to the federal interpretations of our state counterparts as persuasive authority." *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206 (Miss. 2001) (citing *Owens v. Thomae*, 759 So. 2d 1117, 1121 n.2 (Miss. 1999); *Quinn v. Mississippi State Univ.*, 720 So. 2d 843, 846 (Miss. 1998); *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 364 n.1 (Miss. 1983)). The Fifth Circuit has repeatedly held that dismissal under Rule 12(b) is appropriate when there is an enforceable arbitration clause. *Murchison Capital Partners, L.P. v. Nuance Communications, Inc.*, 625 Fed. App'x 617, 627 (5th Cir. 2015); *Noble Drilling Services, Inc. v. Certex USA, Inc.*, 620 F.3d 469, 472 n.3 (5th Cir. 2010).

The Fifth Circuit, however, has not definitively decided whether Rule 12(b)(1) or Rule 12(b)(3) is the proper rule for motions to dismiss. *See Noble Drilling*, 620 F.3d at 472 n.3 (dismissing case due to arbitration clause but declining to hold which rule applies); *but see*

United States ex rel. Ready Mix United States, LLC v. One Stop Envt'l., LLC, 2013 U.S. Dist. LEXIS 43492, at *4 (N.D. Miss. Mar. 27, 2013) (recognizing circuit agreement that motions to dismiss based on arbitration clauses are proper under Rule 12(b)(3)); *Pittman v. Joe K. Pittman Co.*, 2015 U.S. Dist. LEXIS 165689, at *10 (S.D. Miss. Dec. 10, 2015) (“The Fifth Circuit has declined to decide whether Rule 12(b)(3) is the *only* proper mechanism for addressing a motion to dismiss based on a forum-selection clause, but it has accepted it as a proper mechanism.”). Regardless, Plaintiff’s case should be dismissed either under Rule 12(b)(1) or Rule 12(b)(3), and Plaintiff should be compelled to bring whatever claims it has to the American Arbitration Association, as required by the subcontract. *See Exhibit “A” at 11.*

III. Conclusion

For the reasons set forth above, Encompass Develop, Design & Construct, LLC asks that the Court dismiss Skaggs Building Solutions, LLC’s case pursuant to Miss. R. Civ. P. 12(b)(1) and/or 12(b)(3). Alternatively, Encompass asks that the Court compel Plaintiff to arbitrate this dispute and stay this matter until after resolution of the arbitration.

This, the 25th day of March, 2019.

Respectfully submitted,

**ENCOMPASS DEVELOP, DESIGN &
CONSTRUCT, LLC**

By Its Attorneys,
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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing document via the Court's electronic filing system which sent notification of such filing to all counsel of record.

This, the 25th day of March, 2019.

/s/ Adam Stone _____
ADAM STONE